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7                   **UNITED STATES DISTRICT COURT**  
8                   **EASTERN DISTRICT OF CALIFORNIA**  
9

10 LACHANCE L. THOMAS,

Case No. 1:23-cv-00690-EPG-HC

11                   Petitioner,

ORDER TO SHOW CAUSE WHY  
PETITION SHOULD NOT BE DISMISSED  
FOR FAILURE TO EXHAUST STATE  
JUDICIAL REMEDIES

12                   v.

13 T. ALLEN,

14                   Respondent.

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16                  Petitioner Lachance L. Thomas is a state prisoner proceeding *pro se* with a petition for  
17 writ of habeas corpus pursuant to 28 U.S.C. § 2254.

18                   **I.**

19                   **BACKGROUND**

20                  On December 29, 2022, Petitioner filed the instant federal habeas petition challenging his  
21 2017 Fresno County Superior Court convictions in the Sacramento Division of the United States  
22 District Court for the Eastern District of California. (ECF No. 1.) Subsequently, the petition was  
23 transferred to the Fresno Division. (ECF No. 11.) Petitioner has moved for stay and abeyance of  
24 his petition while his unexhausted claims are pending in state court. (ECF Nos. 7, 14.)

25                   **II.**

26                   **DISCUSSION**

27                  Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a  
28 habeas petition and allows a district court to dismiss a petition before the respondent is ordered

1 to file a response, if it “plainly appears from the petition and any attached exhibits that the  
2 petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254  
3 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

4       **A. Exhaustion**

5       A petitioner in state custody who is proceeding with a petition for writ of habeas corpus  
6 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based  
7 on comity to the state court and gives the state court the initial opportunity to correct the state’s  
8 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.  
9 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by  
10 providing the highest state court with a full and fair opportunity to consider each claim before  
11 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.  
12 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

13       In the petition, Petitioner appears to raise the same claims that were raised on direct  
14 appeal to the California Court of Appeal by Petitioner and his codefendant,<sup>1</sup> which include:  
15 sufficiency of the evidence regarding the first-degree murder convictions, erroneous admission  
16 of hearsay from an investigator and text messages from a cellphone, erroneous admission of  
17 irrelevant testimony, failure to instruct on the lesser-included offense of involuntary  
18 manslaughter, and erroneous instruction regarding witness identification. (ECF No. 1 at 56–57.)  
19 The petition specifically notes that Petitioner’s fourth ground for relief is regarding his California  
20 Penal Code section 1170.95 petition and is not exhausted. (ECF No. 1 at 5.)<sup>2</sup> It is unclear  
21 whether the claims raised on direct appeal to the California Court of Appeal were also raised in a  
22 petition for review in the California Supreme Court.

23       If Petitioner has not sought relief in the California Supreme Court for the claims that he  
24 raises in the petition, the Court cannot proceed to the merits of those claims. 28 U.S.C.  
25 § 2254(b)(1). It is possible, however, that Petitioner has fairly presented his claims to the  
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27       <sup>1</sup> On the petition form itself, Petitioner writes “See Attached (Exhibit A)” for Grounds One through Three. (ECF No.  
1 at 4–5.) Attached to the petition are the various briefs filed in the California Court of Appeal on direct appeal by  
Petitioner and his co-defendant and the California Court of Appeal’s opinion. (*Id.* at 8–152.)

28       <sup>2</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 California Supreme Court and failed to indicate this to the Court. Thus, Petitioner must inform  
2 the Court whether his claims have been fairly presented to the California Supreme Court, and if  
3 possible, provide the Court with a copy of the petition filed in the California Supreme Court that  
4 includes the claims now presented and a file stamp showing that the petition was indeed filed in  
5 the California Supreme Court.

6 In the event that Petitioner has not fairly presented his claims to the California Supreme  
7 Court, Petitioner may, at his option, withdraw the unexhausted claims and go forward with the  
8 exhausted claims. See Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) (“[D]istrict courts  
9 must provide habeas litigants with the opportunity to amend their mixed petitions by striking  
10 unexhausted claims as an alternative to suffering dismissal.”).<sup>3</sup> Petitioner may also move to  
11 withdraw the entire petition and return to federal court when he has finally exhausted his state  
12 court remedies.<sup>4</sup> Additionally, Petitioner may move to stay and hold in abeyance the petition  
13 while he exhausts his claims in state court pursuant. Here, Petitioner has filed motions for stay,  
14 which are addressed in section II(B), *infra*.

15 **B. Motion for Stay**

16 In the motion for stay, Petitioner indicates that claims regarding the 1170.95 petition,  
17 ineffective assistance of counsel, and actual innocence are unexhausted. (ECF No. 7.) Under  
18 Rhines v. Weber, 544 U.S. 269 (2005), “stay and abeyance” is available only in limited  
19 circumstances, and only when: (1) there is “good cause” for the failure to exhaust; (2) the  
20 unexhausted claims are not “plainly meritless”; and (3) the petitioner did not intentionally  
21 engage in dilatory litigation tactics. 544 U.S. at 277–78. Under Kelly v. Small, 315 F.3d 1063  
22 (9th Cir. 2002), a three-step procedure is used: (1) the petitioner amends his petition to delete any  
23 unexhausted claims; (2) the court in its discretion stays the amended, fully exhausted petition,  
24 and holds it in abeyance while the petitioner has the opportunity to proceed to state court to

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26 <sup>3</sup> The Court notes that “prisoners filing mixed petitions may proceed with only the exhausted claims, but doing so  
risks subjecting later petitions that raise new claims to rigorous procedural obstacles,” such as the bar against second  
or successive petitions. Burton v. Stewart, 549 U.S. 147, 154 (2007).

27 <sup>4</sup> Although the limitation period tolls while a properly filed request for collateral review is pending in state court, 28  
U.S.C. § 2244(d)(2), it does not toll for the time a federal habeas petition is pending in federal court. Duncan v.  
28 Walker, 533 U.S. 167, 181–82 (2001).

1 exhaust the deleted claims; and (3) once the claims have been exhausted in state court, the  
2 petitioner may return to federal court and amend his federal petition to include the newly-  
3 exhausted claims. 315 F.3d at 1070–71 (citing Calderon v. United States Dist. Court (Taylor),  
4 134 F.3d 981, 986 (9th Cir. 1998)).<sup>5</sup>

5 Here, Petitioner does not provide any explanation whatsoever regarding his failure to  
6 exhaust. Additionally, it is unclear to the Court whether any of Petitioner's claims are exhausted.  
7 Therefore, based on the record before the Court, a stay pursuant either to Rhines or Kelly is not  
8 warranted at this time. However, Petitioner may renew his request for a stay and address the  
9 legal standards set forth above.

III.

## ORDER

12 Accordingly, IT IS HEREBY ORDERED that Petitioner SHALL SHOW CAUSE why  
13 the petition should not be dismissed for failure to exhaust state court remedies within **THIRTY**  
14 (**30**) days from the date of service of this order.

15 Petitioner is forewarned that failure to follow this order may result in dismissal of the  
16 petition pursuant to Federal Rule of Civil Procedure 41(b) (a petitioner's failure to prosecute or  
17 to comply with a court order may result in a dismissal of the action).

IT IS SO ORDERED.

Dated: **June 12, 2023**

[S] Eric P. Groij

**UNITED STATES MAGISTRATE JUDGE**

<sup>5</sup> A petitioner’s use of Kelly’s three-step procedure, however, is subject to the requirement of Mayle v. Felix, 545 U.S. 644, 664 (2005), that any newly exhausted claims that a petitioner seeks to add to a pending federal habeas petition must be timely or relate back, i.e., share a “common core of operative facts,” to claims contained in the original petition that were exhausted at the time of filing. King v. Ryan, 564 F.3d 1133, 1143 (9th Cir. 2009).